MORIAN LAW PLLC
STRATEGIC LEGAL COUNSEL

ARMEN MORIAN, ESQ.
armenmorian@morianlaw.com
(646) 319-1937 (direct)

April 8, 2024

Via NYSCEF

Hon. Arthur F. Engoron
Supreme Court of the State of New York
New York County
60 Centre Street
New York, New York 10007

Re: *People of the State of New York v. Donald J. Trump, et al.*,
Index No. 452564/2022 (Sup. Ct. New York County)

Dear Justice Engoron:

My firm represents Defendant Allen Weisselberg ("Mr. Weisselberg") in the above-referenced matter. I submit this letter on Mr. Weisselberg's behalf in response to the letter of Plaintiff, People of the State of New York, by Letitia James, Attorney General of the State of New York's ("NYAG Letter"), dated April 4, 2024 (filed as NYSCEF 1709).

For the reasons set forth in the letter with accompanying exhibits submitted by the other Defendants in this action responding to the NYAG Letter (filed as NYSCEF 1711-1714; letter attached hereto), in which Mr. Weisselberg joins and adopts as if fully set forth herein, Mr. Weisselberg respectfully requests that the Court deny Plaintiff's extraordinary and wholly improper request, by letter rather than motion practice, to expand the mandate of Justice Barbara Jones (ret.), the court-appointed monitor, by granting her authority, post-judgment, to investigate and report *ex parte* on matters of pretrial disclosure.

Respectfully submitted,

Armen Morian, Esq.
Morian Law PLLC

Attachment

cc: All Counsel of Record (via NYSCEF)

LAW OFFICES
ROBERT & ROBERT PLLC

526 RXR PLAZA
UNIONDALE, NEW YORK 11566
(516) 832-7000
FACSIMILE (516) 832-7000

ONE GRAND CENTRAL PLACE
60 EAST 42ND STREET, SUITE 4600
NEW YORK, NEW YORK 10165*
(212) 858-9270
*NOT FOR MAIL OR SERVICE OF PROCESS

WWW.ROBERTLAW.COM

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VIA NYSCEF
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60 Centre Street
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Re: *People of the State of New York, et al. v. Donald J. Trump, et al.*,
Index No. 452564/2022 (Sup. Ct. New York County)

Dear Justice Engoron:

This firm writes on behalf of defendants President Donald J. Trump, Donald Trump Jr., Eric Trump, The Donald J. Trump Revocable Trust, The Trump Organization, Inc., Trump Organization LLC, DJT Holdings LLC, DJT Holdings Managing Member LLC, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC, and Seven Springs LLC ("Defendants") in response to the letter of Plaintiff, People of the State of New York, by Letitia James, Attorney General of the State of New York's ("Plaintiff" or the "NYAG"), dated April 4, 2024 requesting, *inter alia*, that the final judgment be reopened so that it can be materially expanded to authorize and direct the Monitor to investigate issues of pre-trial discovery. As explained in greater detail below, the Court should decline the NYAG's extraordinary ***post-judgment*** letter request for various reasons, including that:

- The Court lacks authority to re-open or modify a final judgment now on appeal either *sua sponte* (pursuant to CPLR § 5019) or on motion (pursuant to CPLR § 5015);

- The NYAG's request that the Monitor be authorized and directed to wade into discovery issues far exceeds the limited scope of the Monitor's powers as requested by the NYAG and established by this Court in the final judgment and all prior orders;

- The NYAG waived any right to challenge pre-trial discovery upon filing her note of issue on July 31, 2023;

- The NYAG not only actively participated in but also directed the discovery process she now seeks to have the Monitor "investigate"; and

- Authorizing a Court-appointed Monitor to conduct the NYAG's requested *ex parte* investigation of pre-trial discovery matters is a violation of the constitutional principle of separation of powers.

A. There Is No Basis to Reopen and Modify the Final Judgment.

The NYAG's attempt to address matters of pretrial disclosure well after entry of the final judgment is contrary to blackletter First Department law.

Supreme Court's authority to modify a final judgment either *sua sponte* or on motion is circumscribed by statute and caselaw. At base, "[a] court's inherent power to exercise control over its judgments is not plenary, and should be resorted to only to relieve a party from judgments taken through fraud, mistake, inadvertence, surprise or excusable neglect." See McKenna v. Nassau Cnty., 61 N.Y.2d 739, 742 (1984) (internal citations and quotations omitted). Moreover, it is patently inappropriate to reopen a case and enable a party to make an unspecified supplemental presentation months after the close of all evidence and the issuance of a final judgment that is subject to review by the Appellate Division. See Shapiro v. Shapiro, 151 A.D.2d 559, 560-61 (2d Dep't 1989) (motion to reopen should be denied "especially when such motion is made after the court rules on the relevant issue, the movant fails to disclose the nature of the omitted evidence and the evidence sought to be introduced is not newly discovered"), citing Oregon Leopold Day Care Ctr. Ass'n, Inc. v. DiMarco Constructors Corp., 104 A.D.2d 719, 719-20 (4th Dep't 1984) (motion to reopen made after court ruled on motion for judgment properly denied).

Pursuant to CPLR § 5019, the trial court's *sua sponte* authority to modify the judgment is also limited to curing only a mistake, defect or irregularity "not affecting a substantial right of a party." Betts v. Tsitiridis, 171 A.D.3d 573, 573 (1st Dep't 2019). CPLR § 5019 is intended to "to correct clerical-type errors that may be contained in orders or judgments" and "cannot be used by courts to *sua sponte* correct errors that involve," *inter alia*, "new exercises of discretion or fact-finding." Sokoloff v. Schor, 176 A.D.3d 120, 130 (2d Dep't 2019) (internal citations omitted). There is no question that any modification to the judgment would materially affect Defendants' substantive rights and is thus beyond the Court's *sua sponte* authority. There is also no question the NYAG's request by definition involves "new exercises of discretion" and new "fact-finding." Id.

The grounds upon which the NYAG could move for relief from the judgment are likewise limited by CPLR § 5015 to, *inter alia*, "newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial" and "fraud, misrepresentation, or other misconduct of an adverse party." In a motion pursuant to CPLR § 5015(a)(2), the movant must show that any newly discovered evidence is "material, [] not merely cumulative, [] not of such a nature as would merely impeach the credibility of an adverse witness and that it would probably change the result

previously reached." In re Catapano, 17 A.D.3d 673, 674 (2d Dep't 2005) (internal citations omitted).[1] CPLR § 5015 is simply not a device to find "newly discovered evidence."[2]

Here, the NYAG's letter request satisfies none of these requirements. First, the NYAG does not allege that the judgment contains any mistake, defect or irregularity. Second, the NYAG does not allege that there is any newly-discovered evidence which would have produced a different result at trial and does not (and could not) contend the outcome of the trial would have been at all different. As a result, the NYAG's request should be denied as a matter of law.

B. The NYAG's Request Far Exceeds the Scope of the Monitorship Ordered by this Court.

The NYAG also seeks to fundamentally alter and expand the scope of the Monitor's role for a purpose that was never requested during the long pendency of these proceedings or contemplated in the final judgment. The quasi-prosecutorial, retrospective investigative authority the NYAG requests far exceeds the limited prospective powers of the Monitor specified in the ***final*** judgment.

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[1] In a motion pursuant to CPLR § 5015(a)(3), the court likewise "must be convinced that the conduct complained of is something that could have affected the outcome." Siegel on N.Y. Prac. § 429; see also Oppenheimer v. Westcott, 47 N.Y.2d 595, 604 (1979) (holding that that the misrepresentation as to the number of shares owned and failure to inform the Court that causes of action had been dismissed constituted "misconduct, if not fraud, warranting vacatur of the judgment"); Dilorio v. Gibson & Cushman of New York, Inc., 161 A.D.2d 532, 533 (1st Dep't 1990) ("Oppenheimer involved the outright perjury of plaintiff as to his ownership of certain securities in the course of his testimony at an inquest for damages; this type of 'misconduct' (or fraud) is totally distinguishable from the situation at bar."); Nahzi v. Lieblich, 89 A.D.3d 630 (1st Dep't 2011) (affirming denial of motion to vacate "on the ground that plaintiff's deposition testimony in a subsequent action render[ed] his version of events in this action false and misleading").

[2] Curiously, the NYAG also asserts that Defendants have an obligation to take some kind of remedial measure based upon the fact that Mr. Weisselberg ***publicly*** "admitted to false statements made on October 10, 2023, during the trial held in this matter." NYSCEF Doc. No. 1789. However, there is simply no remedial measure that counsel for Defendants are obligated to take, given that the highly publicized plea itself constitutes a remedial measure with respect to any prior testimony since the Court (and everyone else, for that matter) is well aware of any purported falsity. Under the circumstances, since Mr. Weisselberg was not a witness for Defendants, the only duty to take remedial action would flow from Rule 3.3(b) of the New York Rules of Professional Conduct. That Rule provides: "A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." To be clear, counsel for Defendants have no "knowledge" that Mr. Weisselberg made false statements during the trial; to the contrary, many believe that Mr. Weisselberg only made such admissions because he was being threatened with life in prison. Indeed, counsel for Defendants have no more "knowledge" that Mr. Weisselberg made these purportedly false statements than the Court or any other person who read of his highly publicized guilty plea. See, e.g., Doe v. Federal Grievance Committee, 847 F.2d 57, 62 (2d Cir. 1988) ("[a lawyer] must clearly know, rather than suspect, that a fraud on the court has been committed before he brings this knowledge to the court's attention").

In her October 13, 2022, motion for a preliminary injunction, the NYAG's request for a monitor was two-fold: (1) "ensuring that the accountants, lenders, and insurers receive . . . all of the necessary and relevant information relating to the valuations" in the statements of financial condition; and (2) preventing the removal of assets from the jurisdiction during the pendency of the action. NYSCEF Doc. No. 38 at 19. In its November 3, 2022, order appointing the Monitor, this Court noted that the Monitor's "limited function [wa]s entirely different from the functions of a receiver, who would, in effect, take control of the entire organization." NYSCEF Doc. No. 183 at 10. The November 18, 2022, supplemental monitorship order further specified that while the Monitor's duties would include "monitoring of" submission of financial information, disclosures, corporate restructuring, and dissipation of significant assets, they "shall not include monitoring Defendants' normal, day-to-day business operations." NYSCEF Doc. No. 194 at 1.

The Monitor's letter reports provided over the course of the monitorship confirm the limited scope of her duties. These duties included review of the Trump Organization's corporate structure, assistance in dissolving dormant entities, review of reports regarding restructuring and disposition of assets, and review of financial information to third parties. NYSCEF Doc. Nos. 441, 489, 617, 647, 1641, 1681. In fact, in her summary report, the Monitor specifically stated that ***her duties did not include "conducting proactive independent investigations."*** NYSCEF Doc. No. 1681 at 3.

This Court's final judgment after trial extending the monitorship for three years similarly described the Monitor's role as "overseeing the Trump Organization's financial disclosures to any third parties and any transfer or other dissipation of assets." NYSCEF Doc. No. 1688 at 85-86. In "enhanc[ing]" her "role and duties," this Court specified only that "the Trump Organization shall be required to obtain prior approval . . . before submitting any financial disclosure to a third party." Id. at 88. The Court further ordered that the Monitor submit a proposed order "outlining the specific authority . . . to effectuate a productive and enhanced monitorship going forward." Id. at 89; see also NYSCEF Doc. No. 1699 at 5 (incorporating decretal paragraphs from the decision after trial into the final judgment).

Consistent with the final judgment, the Court issued a supplemental monitorship order on March 21, 2024 (NYSCEF Doc. No. 1706), detailing the Monitor's (1) general duties and responsibilities, (2) assessment of internal controls and governance, (3) review of financial disclosures, transfers, dissolution and restructuring of assets, (4) access to information, and (5) reporting by the Monitor as to compliance with the monitorship order. Id. Notably, the Monitor's general duties and responsibilities, as set forth in that order, include: review of Defendants' "internal accounting controls, governance, record-keeping, and financial reporting policies and procedures"; "compliance with internal accounting controls"; and "preparation and presentation of financial disclosures prior to their issuance to third parties." Id. at 2. Additionally, the Monitor's access to information is limited to documents necessary "to be fully informed about Defendants' accounting, finances and financial disclosures." Id. at 4.

The order entered to implement the final judgment, like all those entered throughout the case, seeks to prevent any purported deficiencies in Defendants' future dissemination of financial information and ensure Defendants' assets are preserved pending appeal. The Monitor's powers are thus narrowly focused and decidedly prospective. There has never been any mention of any retrospective investigatory powers relative to pre-trial discovery or anything else. The Court would be acting *ultra vires* in effectively reopening the final judgment to augment the scope of the Monitor's authority, particularly where it is not itself permitted to exercise the unfettered investigative authority the NYAG requests.

C. The NYAG Waived Further Discovery Upon Filing Her Note of Issue.

Having previously certified that discovery is complete, the NYAG is also precluded from now re-opening pretrial discovery issues. On July 31, 2023, the NYAG filed a note of issue and certificate of readiness confirming, *inter alia*, that (1) all discovery known to be necessary had been completed, (2) there were no outstanding discovery requests, (3) there had been a reasonable opportunity to complete pretrial disclosure, (4) all pretrial orders issued by Supreme Court had been complied with, and (5) the case was ready for trial. NYSCEF Doc. No. 644. The NYAG never moved to vacate the note of issue; nor has she ever contended that any representation she made therein was inaccurate.

On October 2, 2023, the parties commenced trial on an expedited schedule that the NYAG had theretofore vigorously defended. See, e.g., NYSCEF Doc. No. 1637. Approximately three months of testimony ensued. NYSCEF Doc. Nos. 1637, 1657-1661. Closing arguments were then presented. NYSCEF Doc. Nos. 1669, 1675-1676. Following the close of the record, on February 23, 2024, Supreme Court entered judgment in the NYAG's favor. NYSCEF Doc. No. 1699. Defendants then filed Notices of Appeal and, following extensive motion practice, obtained a partial stay of judgment from the Appellate Division, First Department contingent upon Defendants' posting a reduced bond. NYSCEF Doc. Nos. 1701-1702; Appeal No. 2024-01134, NYSCEF Doc. No. 21. As a result, every aspect of the final judgment has now been stayed pending appeal, except for those portions relative to the Monitor's ongoing ***financial oversight*** and the institution of an independent director of compliance, which Defendants did not seek to stay. Appeal No. 2024-01134, NYSCEF Doc. No. 21. Despite the foregoing, now, nearly nine months after the filing of the note of issue wherein she certified that this case was trial-ready, and after final judgment has been entered and the case is now up on appeal, the NYAG has declared that, upon further reflection, she is not certain that discovery has been completed to her satisfaction.

The Court of Appeals has observed that "it bears emphasizing that the filing of a note of issue denotes the completion of discovery, not the occasion to launch another phase of it." Arons v. Jutkowitz, 9 N.Y.3d 393, 411 (2007). Accordingly, it is well-settled the NYAG "waived her right to further disclosure when she filed her note of issue and certificate of readiness, which stated both that disclosure was complete and that there were no outstanding disclosure requests." Melcher v. City of New York, 38 A.D.3d 376, 377 (1st Dep't 2007) (internal citations omitted); see, e.g., Matter of New York City Asbestos Litigation, 193 A.D.3d 559 (1st Dep't 2021);

Rodriguez v. City of New York, 105 A.D.3d 623, 625 (1st Dep't 2013). Likewise, "by filing a note of issue stating that disclosure was complete, [P]laintiff[] waived any defects" in Defendants' production. Escourse v. City of New York, 27 A.D.3d 319, 320 (1st Dep't 2006) (internal citations omitted); see Marte v. City of New York, 102 A.D.3d 557, 448 (1st Dep't 2013); Fernandez v. City of New York, 84 A.D.3d 595, 596 (1st Dep't 2011). "Plaintiff's remedy" regarding any purported insufficiency in Defendants' production, including that which she now complains of, "was to make a motion pursuant to CPLR [3124] or [3126][3] *before the filing the note of issue and certificate of readiness*, a course of action she chose not to take." Melcher, 38 A.D.3d at 377 (emphasis added), citing Brown v. Veterans Transp. Co., Inc., 170 A.D.2d 638 (2d Dep't 1991).

Based upon the foregoing, the NYAG clearly waived her right to re-open discovery once she filed her note of issue on July 31, 2023. For that reason, the NYAG's request should be denied.

D. The NYAG Participated In and Directed the Discovery Process.

The NYAG's request to revisit discovery issues after having certified that all discovery is complete and after final judgment has been entered is even more disingenuous given the active role the NYAG played in directing the discovery process.

As detailed in Jackson affidavits produced by Defendants,[4] the NYAG served her document requests in this action on December 9, 2022. Ex. A. ¶ 30. ***From the outset of the production process, Defendants collaborated with the NYAG, allowing her direct and continuing input as to the search terms utilized; ongoing, detailed updates regarding the search process and results; and ultimately full and direct access to Haystack, the third-party e-discovery vendor approved by the NYAG.*** Id. In January 2023, the parties met and conferred on discovery issues, and Defendants memorialized certain production issues identified by the NYAG in a January 10, 2023, email. Id. ¶ 31. In that email, Defendants outlined the parties' agreement that items Defendants produced during the related special proceeding would not need to be reproduced, and Defendants invited the NYAG to collaborate in providing search terms for locating additional responsive documents. Id. The NYAG claimed that there were certain "gaps" in Defendants' production during the special proceeding, and Defendants welcomed and awaited the NYAG's instruction on how such alleged gaps should be addressed. Id.

[3] The First Department in Melcher cited "CPLR 3214 and 3216," a presumed typographical error given that those sections refer to discovery stays and dismissal for want of prosecution. Id.

[4] A copy of the affidavit of Donald Trump, Jr., on behalf of Defendants The Trump Organization, Inc., Trump Organization LLC, DJT Holdings LLC, DJT Holdings Managing Member, Trump Endeavor 12 LLC, 401 North Wabash Venture LLC, Trump Old Post Office LLC, 40 Wall Street LLC, and Seven Springs LLC is annexed hereto as **Exhibit A**. Copies of the affidavits of (1) President Donald J. Trump, (2) Donald Trump, Jr., (3) Eric Trump, (4) Allen Weisselberg, (5) Jeffrey McConney, and (6) Donald Trump, Jr., on behalf of the Donald J. Trump Revocable Trust, are annexed hereto as **Exhibit B**. A full set of exhibits referenced in the affidavits is annexed hereto as **Exhibit C**.

The parties then conferred continuously regarding the appropriate search terms to run during an iterative and cooperative production process. The NYAG provided direct and substantial input over the search terms run, had unprecedented direct access to Haystack throughout the process, was provided reports about the search results, and provided modifications to searches as needed based on the reports received. Id. ¶¶ 32–41, 43–47, 49–75.

More specifically, commencing January 21 and continuing through February 5, 2023, Haystack received from Defendants and processed approximately ***3.27 terabytes*** of data and uploaded approximately ***5,591,269 documents*** into the Relativity database. Ex. C at 530. On February 14, in response to follow-up communications with the NYAG, Defendants provided Haystack with another approximately 130GB of data and approximately 451,734 documents from the 45Office accounts. Id. Thereafter, Defendants developed a list of search terms, ***provided that list to the NYAG, and then worked collaboratively with the NYAG and Haystack to finalize the initial set of search terms.*** Id. Haystack then applied those search terms, applied de-duplication and other filters designed to remove previously produced records, and compiled an initial set of potentially responsive documents. Id. That initial set comprised a total of 1,057,538 (direct) and 1,346,221 (family) documents. Id. Since this initial set was clearly unmanageable, Defendants ***again collaborated directly with the NYAG and Haystack to further refine the search terms. Defendants placed the NYAG counsel in direct contact with Haystack and gave the NYAG the ability to dictate revisions to the search terms.*** Id. Haystack then applied the revised set of search terms and, by February 17, compiled an updated set of 928,526 (direct) and 1,151,380 (family) documents. Id. This updated set was again too large. Id. So again, ***Defendants collaborated directly with the NYAG and Haystack, again placing the NYAG in direct contact with Haystack and allowing the NYAG to dictate fully the search terms and process.*** Id. By March 17, 2023, the search terms had been revised, yet again, and an updated set of 157,352 (direct) and 255,981 (family) documents had been compiled. Id. Since this set remained unmanageable, ***Defendants and the NYAG continued to work directly with Haystack, providing the NYAG yet again direct access to Haystack. The NYAG once again had direct input into the final search terms.*** Id. By April 11, 2023, a final set of 101,607 documents had been identified for review. Id. At this point, a plan was developed with the agreement of the NYAG and a process implemented for responsiveness review. Id. On April 17, 2023, a team of approximately 90 contract reviewers (under the direction and supervision of Haystack) was trained and deployed to review and process the final set of identified documents. Id.

Defendants produced documents to the NYAG on March 31, April 21, 24, and 26, 2023, and May 4, 5, 12, and 14. Ex. A ¶¶ 76, 83, 84, 87, 89-92. In compliance with an order of this Court, Defendants then provided the NYAG with Jackson affidavits in May 2023 explicating the extensive search efforts Defendants took to locate and process an extraordinary volume of documents and communications responsive to the NYAG's voluminous and burdensome requests. See generally Exs. A-C. The NYAG has never challenged the sufficiency or accuracy of those affidavits. Defendants' disclosures, as well as the filing of their Jackson affidavits, fulfilled Defendants' discovery responsibilities. The NYAG's inextricable involvement in the search

process, which allowed her to address any deficiencies in real time makes this improper post-trial attempt to seek additional information all the more egregious.

The NYAG's failure to move to compel disclosure or for sanctions under the CPLR "at the appropriate time (i.e., ***prior to trial***)," instead filing a note of issue and certificate of readiness "expressly affirming that discovery had been completed," as a matter of black-letter law precludes her from now claiming noncompliance with pretrial disclosure orders. Brown v. Veterans Transp. Co., Inc., 170 A.D.2d at 639 (emphasis added) (internal citations omitted); see also Paulino v. Xing Wu Chen, 187 A.D.3d 547, 548 (1st Dep't 2020); Williams v. Laura Livery Corp., 173 A.D.3d 497, 498 (1st Dep't 2019); Rivera-Irby v. City of New York, 71 A.D.3d 482, 482 (1st Dep't 2010); Dezer Properties 4, LLC v. Brody, 29 Misc.3d 26, 28 (Sup. Ct. App. Term, 1st Dep't 2010).[5]

E. The NYAG's Post-Judgment Request is Unconstitutional.

Finally, the NYAG's open-ended request violates deep-seated separation of powers principles enshrined in caselaw and the Constitution of this state. "One of the fundamental principles of government underlying our Federal Constitution is the distribution of governmental power into three branches—the executive, legislative and judicial—to prevent too strong a concentration of authority in one person or body." Under 21, Catholic Home Bur. For Dependent Children v. City of New York, 65 N.Y.2d 344, 355 (1985), citing Youngstown Co. v. Sawyer, 343 U.S. 579, 634-635 (1952) (Jackson, J., concurring). "The principle of separation of powers has long been recognized as 'included by implication in the pattern of government adopted by the State of New York.'" Roberts v. Health and Hospitals Corp., 87 A.D.3d 311, 322 (1st Dep't 2011), quoting Under 21, Catholic Home Bur. For Dependent Children, 65 N.Y.2d at 355–356. While "common sense and the necessities of government do not require or permit a captious, doctrinaire and inelastic classification of government functions," (Clark v. Cuomo, 66 N.Y.2d 185, 189 [1985] [internal quotation marks and citations omitted]), the doctrine of separation of powers "does require that no one branch be allowed to arrogate unto itself powers residing entirely in another branch," (Under 21, Catholic Home Bur. For Dependent Children, 65 N.Y.2d at 356 [internal quotation marks and citations omitted]).

A court-appointed agent of the judiciary such as the Monitor, whom this Court has referred to as an "arm of the court," is equally subject to those fundamental principles. Therefore, the Court may not confer authority on the Monitor exceeding its own powers. "Just as the other branches of government may not compel the judiciary to perform nonjudicial functions of government, the

[5] The NYAG's purported reservation of her "right to seek relief after trial relating to Defendants' spoliation of evidence" in an affirmation annexed to the note of issue fails to revive her ability to raise pretrial disclosure matters after the note of issue is filed; certainly, it does not authorize her to raise such matters *after* the entry of final judgment. See NYSCEF Doc. No. 645.

courts must refrain from arrogating such powers to themselves." Campaign for Fiscal Equity, Inc. v. State, 29 A.D.3d 175, 185 (1st Dep't 2006).

The Court of Appeals has long recognized that the New York Constitution and the separation of powers doctrine prevent a justice of the Supreme Court from being charged with the duties of a prosecutor in aid of the executive:

> "The function of the judges 'is to determine controversies between litigants.' Matter of State Industrial Commission, [224 N.Y. 13 (1918)]. They are not adjuncts or advisers, much less investigating instrumentalities, of other agencies of government. Their pronouncements are not subject to review by Governor or Legislature. They speak 'the rule or sentence.'"

Matter of Richardson, 247 N.Y. 401, 411 (1928) (internal citation omitted); see also Soares v. Carter, 25 N.Y.3d 1011, 1013-14 (2015) (finding that Supreme Court improperly "assumes the role of the district attorney by compelling prosecution" through the use of its contempt powers); Soares v. State, 68 Misc.3d 249, 295-296 (Sup. Ct. Albany Cty. 2020) (granting justices of appellate division authority to issue recommendation to Governor regarding removal of prosecutors was "clearly outside the bounds of a judge's purview").

In Richardson, the Court of Appeals was tasked with reviewing a statute that authorized the Governor to direct a justice of the Supreme Court to conduct an investigation into charges against a public officer. Matter of Richardson, 247 N.Y. at 405-06. Before giving notice to the accused that he would take evidence at a public hearing, the justice appointed a team of counsel and experts and performed a "preliminary investigation" at which "neither the accused officer nor counsel for the officer was to be permitted to be present." Id. at 406. This included taking *in camera* testimony from witnesses subpoenaed by the justice, none of which was ever "embodied in a public record subject to public scrutiny or inspection by opposing counsel," except insofar as the witnesses' statements might be repeated at the public hearing. Id. at 407.

The Court of Appeals, in an opinion written by Judge Cardozo, resoundingly rejected the statute as "an encroachment on the independence of judicial power," under which:

> The judge is made a prosecutor. He is to have his counsel and assistant counsel and experts and detectives. He is to follow trails of suspicion, to uncover hidden wrongs, to build up a case as a prosecutor builds one. If he were the district attorney of the county, he would do no more and no less. What he learns is not committed to a record available to all the world. It is locked within his breast to be withheld or disclosed as his discretion shall determine. No doubt he is to act impartially, neither presenting from malice nor concealing from favor. One might say the same of any prosecutor.

> The outstanding fact remains that his conclusion is to be announced upon a case developed by himself. Centuries of common-law tradition warn us with echoing impressiveness that this is not a judge's work. We should be sorry to weaken that tradition by any judgment of this court.

Id. at 411-12.

The *ex parte* "investigation" that the NYAG requests the Monitor, a delegate of this Court, perform with her internal team of counsel is equally offensive to separation of powers and the New York Constitution. By mere letter request, without motion practice or any application to reopen the final judgment, the NYAG asks this Court to now modify the final judgment and expand the Monitor's mandate to include review of the pre-trial discovery process. The NYAG's aim, apparently, is to substantiate her utterly speculative claims that Defendants "withheld relevant and responsive information" from her office during discovery.[6] NYSCEF Doc. No. 1709. The NYAG is silent as to her intended use of any information she acquires, and it cannot possibly affect the outcome of the trial or the final judgment. However, she makes clear that the information would be provided *ex parte* "to the Court and OAG," underscoring her stated desire that Defendants and their counsel be deprived of the right to be present for any part of the Monitor's investigation and to contemporaneously inspect her findings. Id.

The NYAG's astonishing request is an evident play to transform the Monitor into her own special counsel. To be sure, the NYAG's proposed investigation, as in Richardson, bears no hallmark of a judicial proceeding. Rather, it is a politicized investigatory proceeding shrouded in secrecy to concoct a speculative claim that Defendants engaged in some malfeasance during a discovery process managed by the NYAG and that concluded to the NYAG's purported satisfaction last summer. None of the Monitor or her staff's activities are required to be presented to Defendants or the public. Yet, when the Monitor reaches her conclusion, it will be "upon a case developed by h[er]self." As the Court of Appeals explained in Richardson, "[a] preliminary investigation, thus restricted, is not a hearing by a judge. It is a search by an inquisitor." Matter of Richardson, 247 N.Y. at 407.

That the NYAG has made her request by informal letter application, after entry of final judgment and the imposition of a stay pending appeal, exacerbates these concerns. Thus, the Court's entry of the NYAG's proposed order would not comport with the CPLR or be subject to standard appellate review. More fundamentally, there is no justiciable controversy presently before the Court. Final judgment was entered nearly two months ago, and a stay pending appeal is in place. As set forth above, the NYAG does not move to re-open and modify the judgment or the scope of the monitorship by any device in the CPLR or applicable caselaw. Mr. Weisselberg's

[6] As set forth above, the NYAG conveniently fails to inform the Court that her nascent complaint relates to a discovery process in this case which she herself managed and directed. She cannot now be heard to complain of the product of her own instruction.

criminal case before Supreme Court is likewise disposed. Indeed, the NYAG seeks only to initiate a non-public *ex parte* investigation into mooted discovery issues, unfettered by any of the procedural protections Defendants would be entitled to in a standard proceeding governed by the CPLR. Presumably, she would like an advisory opinion conveyed directly to her office. This is plainly inconsistent with the judicial function. See Matter of Richardson, 247 N.Y. at 410 ("Elasticity has not meant that what is of the essence of the judicial function may be destroyed by turning the power to decide into a pallid opportunity to consult and recommend"); Roberts v. Health and Hospitals Corp., 87 A.D.3d at 322 (cases presenting "nonjusticiable controversies" involve, *inter alia*, "advisory opinions" and "moot issues").

For all of the foregoing reasons, Defendants respectfully request that the Court deny the NYAG's request in its entirety.

Respectfully submitted,

ROBERT & ROBERT PLLC

Clifford S. Robert

CLIFFORD S. ROBERT

cc: All Counsel of Record (via NYSCEF)